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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

HCL PARTNERS LIMITED PARTNERSHIP, On Behalf of Itself and All Others Similarly Situated, Plaintiff, v. LEAP WIRELESS INTERNATIONAL, INC., S. DOUGLAS HUTCHESON, DEAN M. LUVISA, AMIN I. KHALIFA and PRICEWATERHOUSECOOPERS, LLP, Defendants.	**ECF CASE** **No. 07-CV-2245-BTM-NLS** Date: March 28, 2008, 2008 Time: 11:00 A.M. Courtroom: 15 (5th Floor) Per Chambers No Oral Argument Unless Requested by the Court

THE NEW JERSEY CARPENTERS PENSION AND BENEFIT FUNDS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION FOR CONSOLIDATION, APPOINTMENT OF LEAD PLAINTIFF AND APPROVAL OF LEAD COUNSEL

INTRODUCTION

The New Jersey Carpenters Pension and Benefit Funds (the "Carpenters Funds") respectfully submit this reply memorandum of law in further support of their motion for consolidation, appointment of the Carpenters Funds as lead plaintiff and approval of Schoengold Sporn Laitman & Lometti, P.C. ("SSLL") as lead counsel and Glancy Binkow & Goldberg LLP ("GBG") as liaison counsel.

The competing movants, Westchester Capital Management, Inc. ("Westchester") and Green & Smith Investment Management, LLC ("Green & Smith") (collectively, the "Investment Advisors"), do not dispute that the Carpenters Funds are qualified to serve in this case as lead plaintiff, nor do they raise any issues with respect to the Carpenters Funds' choice of counsel. Instead, the Investment Advisors oppose the Carpenters Funds' lead plaintiff motion on a single, solitary ground: that the Investment Advisors' purported financial interest in the relief sought by the putative class herein is greater than that of the Carpenters Funds. However, in so doing, the Investment Advisors attempt to improperly supplement their original motion with extraneous information that should have been included therein and mislead the Court about their role in *Kaplan v. Gelfond*, 240 F.R.D. 88 (S.D.N.Y 2007) ("*IMAX*").

As explained below, these two tactics should be rejected out of hand.

ARGUMENT

POINT I

THE INVESTMENT ADVISORS ARE NOT PERMITTED TO SUPPLEMENT THEIR INITIAL MOTION FOR LEAD PLAINTIFF

The Investment Advisors' opposition papers consist in part of the Declaration of Karen E. Fisch, dated March 14, 2008 (the "Fisch Declaration"). Attached as Exhibit A to the Fisch Declaration is a revised schedule of the Investment Advisors' transactions in securities of Leap

Wireless International, Inc. ("Leap") (the "Revised Transaction Schedule"). Attached as Exhibit B is a revised chart purporting to re-calculate the Investment Advisors' financial interest in the relief sought herein (the "Revised Loss Chart").

However, the Revised Transaction Schedule seeks to correct a deficiency in the Investment Advisors' initial filling.[1] Similarly, the Revised Loss Chart seeks to supplement information previously filed with the Court and enlarge the Investment Advisors' purported financial interest. These untimely filings violate the strict, sixty-day deadline imposed by the PSLRA, which requires that the information set forth in Exhibits A and B to the Fisch Declaration be included in a movant's initial motion papers. *See e.g., In re Telxon Corp. Sec. Litig.,* 67 F. Supp. 2d 803, 818 (N.D.Ohio 1999) ("The PSLRA is unequivocal and allows for no exceptions. All motions for lead plaintiff must be filed within sixty (60) days of the published notice for the first-filed action. ***The plain language of the statute precludes consideration of a financial loss asserted for the first time in a complaint, or any other pleading … filed after the sixty (60) day window has closed."***) (emphasis added); *Singer v. Nicor, Inc.*, Civ. No. 02-5168, Slip Op. at 6 (N.D. Ill. Oct, 16, 2002) (a copy of this decision was annexed to the Declaration of Andy Sohrn, dated March 14, 2008, as Exhibit 9) (rejecting any attempt to recalculate a movant's alleged financial interest in the relief sought after the 60-day deadline has expired).

As a result, Exhibits A and B to the Fisch Declaration should not be considered on this motion, and instead, they should be stricken from the record.

[1] This deficiency is alluded to in Footnote 2 of the Investment Advisors' memorandum of law in opposition.

POINT II

WHAT HAPPENED IN THE *IMAX* CASE CONFIRMS THAT THE INVESTMENT ADVISORS ARE UNSUITABLE LEAD PLAINTIFFS

On page 6 of their memorandum of law in opposition, the Investment Advisors argue that they "have the experience to direct and ensure adequate representation of a class of investors." In support of this contention, they cite to *IMAX*, 240 F.R.D. at 88.[2]

What the Investment Advisors conveniently fail to point out, however, is that in *IMAX*, once Westchester was appointed sole lead plaintiff, it immediately turned around and filed a consolidated amended class action complaint that inexplicably included the Steelworkers Pension Trust ("Steelworkers Trust") as an additional named plaintiff. *See* Sohrn Decl. Exhibit 2, ¶ 7. This apparently was done without leave of the court and without any explanation whatsoever as to why it was necessary or how it benefited the class.

First, the allegation in paragraph 5 of the *IMAX* complaint that Westchester is "the investment advisor for GS Master Trust" is directly at odds with the Behren certification filed herein, which claims that Green & Smith "is the advisor to…GS Master Trust." *See* Behren Cert., ¶ 1.

Second, if the Investment Advisors had the requisite authority to sue from their hedge fund clients and there were no legal or factual issues surroundings their *bona fides*, there would have been no reason in the world why Westchester would feel compelled to include the Steelworkers Trust in its consolidated complaint in *IMAX*. After all, the Steelworkers Trust was a competing movant, represented by opposing counsel, which sought appointment in lieu of

[2] In *IMAX*, Westchester moved to be appointed sole lead plaintiff. *IMAX*, 240 F.R.D. at 90. In support of its motion, Westchester relied on a certification signed by Roy Behren "on behalf of Westchester Capital Management, Inc., GS Master Trust, MSS Merger Arbitrage Fund, The Merger Fund, The Merger Fund VL and Sphinx Merger Arbitrage Fund." (A copy of this certification is annexed to the accompanying Declaration of Andy Sohrn ("Sohrn Decl."), dated March 21, 2008, as Exhibit 1). No mention was made in the certification of Green & Smith, whom Behren in this case claims is the investment advisor to GS Master Trust. As noted in the Carpenters Funds' memorandum of law in opposition, in *IMAX*, Judge Buchwald appointed Westchester as sole lead plaintiff.

Westchester. *See IMAX*, 240 F.R.D. at 90. The Steelworkers Trust was rejected by the Court in *IMAX* in favor of Westchester, which was then appointed sole lead plaintiff. *Id.*, at 95-96. Nevertheless, Westchester included the Steelworks Trust in its amended pleading, and even included the Steelworks Trust's counsel on the signatory line of the complaint. (Sohrn Decl. Ex. 1, at 114).

The only conclusion to be drawn from this conduct is that the Investment Advisors themselves recognize that they are incapable of serving as sole lead plaintiff and class representative in a securities class action. As such, they should *not* be appointed herein.

CONCLUSION

For the forgoing reasons, and for the reasons set forth in the Carpenters Funds' memorandum of law in opposition (*i.e.*, the Invest Advisors lack standing to sue; the Investment Advisors are not authorized by their hedge fund clients to sue on their behalf; as merger arbitrageurs who purchased all of their Leap stock in just five trading days during a two-week period approximately two months before the end of the putative class period, the Investment Advisors are atypical and subject to unique defenses; the Investment Advisors' financial interest in the relief sought by the class is overstated; and the certification filed by the Investment Advisors is deficient on its face), it is respectfully submitted that the New Jersey Carpenters

Pension and Benefit Funds should be appointed lead plaintiff, and their choice of counsel should be approved.

Dated: March 21, 2008

GLANCY BINKOW & GOLDBERG LLP

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